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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1952

No. [redacted] 66

THOMAS QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the District Court denying petitioner's motions to dismiss the indictment (R. 63-78) are reported at 95 F. Supp. 1010, 1012. The majority, concurring and dissenting opinions of the Court of Appeals sitting *en banc* (R. 163-212) are reported at 203 F. 2d 20.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952, and a petition for a rehearing *en banc* was denied on April 13, 1953 (R.

213, 218). The petition for a writ of certiorari was filed on May 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Court of Appeals should have directed an acquittal instead of remanding the instant case for a new trial on the issues of (1) whether petitioner sufficiently claimed his privilege against self-incrimination when he adopted statements made by another witness the preceding day to the same Congressional committee; and (2) whether petitioner intended to refuse to answer the question as charged.

2. Whether further proceedings in the instant case are precluded under the principles of *res judicata* and estoppel because of the acquittal of the other witness whose remarks petitioner adopted by reference.

3. Whether a sufficient showing was made to entitle petitioner to a dismissal of the indictment, or to a hearing to investigate the qualifications of the grand jurors, when it was shown that ten of the twenty members of the grand jury were government employees and that two more were wives of government employees, and various data were offered purporting to show that government employees at the time of the indictment could not be impartial with respect to a person alleged to be a Communist.

4. Whether, under the First Amendment, a Congressional committee, duly authorized to investi-

gate security precautions to prevent Communist union officials from gaining access to plants doing secret defense work, may question an official of a trade union with a substantial membership in such plants as to whether he was a member of the Communist Party.

STATUTE, RULE AND RESOLUTION INVOLVED

The pertinent parts of the statute, Rule of Criminal Procedure and House Resolution involved are set forth in our brief in opposition in the companion case of *Emspak* v. *United States,* No. 796, O.T. 1952, pp. 3-4, 5-6.

STATEMENT

After a trial without a jury petitioner was found guilty under a one-count indictment for refusing, in violation of 2 U.S.C. 192, to answer a question as to whether he was or ever had been a member of the Communist Party, asked by a subcommittee of the Committee on Un-American Activities of the House of Representatives. He was sentenced to six month's imprisonment and fined $500 (R. 81). The facts pertaining to his appearance before the sub-committee may be summarized as follows:

On August 11, 1949, petitioner appeared pursuant to subpoena before a duly organized subcommittee of the Committee on Un-American Activities which was then engaged in investigating Communist infiltration of certain labor unions connected with defense production, particularly Local 601 of the United Electrical, Radio and Machine

Workers of America, CIO, a union affiliated with the Westinghouse Electrical Company which had been engaged in defense production, and which in the past had performed work for the Atomic Energy Commission (R. 92-94, 96, 115, 121). The object of the investigation was to secure information relevant to a pending bill in Congress designed to impose security requirements in those industrial plants working under Government contract (R. 115-116).

Although petitioner was not represented by an attorney at the counsel table (R. 93), he stated that he had an attorney close at hand if he needed him (R. 94, 101, 118). After he had stated that he was a field organizer for the International Union of the United Electrical Radio and Machine Workers and a member of Local 601 of that union, he was asked the question upon which the indictment is based, i.e., whether he was or had been a member of the Communist Party. The following colloquy thereafter occurred (R. 97-98):

> Mr. Quinn. I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support

the position taken by Brother Fitzpatrick yesterday.

Mr. Wood. Did you hear his statement yesterday?

Mr. Quinn. Yes; I did.

Mr. Wood. Do you support it in its entirety?

Mr. Quinn. In its entirety.

Mr. Wood. Is there anything else you want to add to it?

Mr. Quinn. No; I don't.

Mr. Wood. Will you accept it as the expression of your views, then?

Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn. I hold that the Constitution holds sacred the rights of people——

Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

Mr. Quinn. I decline to discuss with the committee questions of that nature.

The record shows that on the day preceding that of the questioning of Quinn, the subcommittee had questioned Thomas J. Fitzpatrick, chief steward of Local 601. Fitzpatrick, before being questioned. was allowed to make an extended statement which was highly critical of the committee, and alleged, in effect, that the committee was attempting to smear the local union, that its investigation was "rigged by a Jesuit priest", and that its purpose was to influence union elections and wage negotiations with the Westinghouse Company (R. 103-106). His opening statement, made before any question was asked, concludes (R. 106-107):

> I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.
>
> The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

Mr. Wood. What is it?

Mr. Fitzpatrick. The right of the people guaranteed by the Constitution.

Fitzpatrick on being questioned was asked by committee counsel whether he was or ever had been a member of the Communist Party. He responded as follows (R. 107-108):

Mr. Fitzpatrick. Mr. Chairman, in my opening remarks I gave quite a bit of my attitude on this question. I say that this committee has no right to pry into my mind.

Mr. Wood. We are not concerned with your opinion of the committee. We have asked you a simple question. Do you want to answer it or not?

Mr. Fitzpatrick. I am answering it, Mr. Chairman.

Mr. Wood. We don't have the time for a long dissertation.

Mr. Fitzpatrick. I think I have a right to answer it in my own way.

Mr. Wood. The question can be answered "Yes" or "No," or you can decline to answer it.

Mr. Fitzpatrick. Being just a common workingman, I will answer it in my own words. I don't think the committee has the right to dictate the choice of my words in answering it.

Mr. Wood. We are not attempting to do that. You may answer or decline to answer.

Mr. Fitzpatrick. I will answer the question. The Constitution guarantees the right to me and every other citizen to have beliefs, whether they are popular or unpopular, and

to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Constitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here.

Mr. Wood. Now will you answer the question?

Mr. Fitzpatrick. I have answered the question.

Thereafter Fitzpatrick kept repeating that he was not refusing to answer the question but that he had answered it. On being asked similar questions he repeated that he had already answered them by his statements already given (R. 108-114). On one occasion he was asked whether he had furnished one Copeland an application blank for the Communist Party, and his answer was as follows (R. 110):

Mr. Fitzpatrick. Mr. Chairman, do I have to give you my answer again?

Mr. Wood. I just want to know whether you did that one thing.

Mr. Fitzpatrick. I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.

Mr. Wood. And for the reason do you decline to answer the question?

Mr. Fitzpatrick. I stand on the protection of the Constitution, the First and Fifth Amendments.

Mr. Wood. And for those reasons decline to answer the question further?

> Mr. Fitzpatrick. I have answered the question.

Fitzpatrick said that he would answer any question regarding any acts that he had done, but would give no answer to any question seeking to elicit his beliefs, in the following colloquies (R. 111, 114):

> Mr. Fitzpatrick. I came here and I stated that if you have any questions about any actions that I have committed, I will answer. So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation.
>
> * * * * *
>
> Mr. Moulder. You say you will answer questions about any acts you have committed.
>
> Mr. Fitzpatrick. That is right.
>
> Mr. Moulder. Don't you feel the Congress of the United States has a right to interrogate people as to their beliefs and what is their hope for the future in those beliefs?
>
> Mr. Fitzpatrick. I think the Congress has no such rights, and I think if you will read the Constitution you will see that. Do we have thought control in the United States now? Are you going to convict people on thinking? I think maybe you fellows should read that Constitution.

The Court of Appeals sitting *en banc* reversed the judgment of the District Court and remanded the case for a new trial (R. 162-213). Its holding

was based principally on the fact that, in considering whether Quinn had validly claimed a personal privilege against self-incrimination by reference to a position that Fitzpatrick had taken the day before, the trial judge had held that he could not do so as a matter of law, regardless of the factual considerations involved.[1] The majority held that no specific formula is required to claim the privilege as a matter of law, and that, where a witness makes an equivocal statement, a question of fact, or at least a mixed question of law and fact, is presented which must be resolved in the first instance by the trial judge in the light of the factual setting of the particular case. In this case, the court held that the sufficiency of Quinn's claim rested on the sufficiency of Fitzpatrick's claim made the day before which was not considered by the trial judge. The court refused to consider this question as an initial proposition and held that in a new trial the trial judge would have to consider (R. 168) "* * * whether Fitzpatrick's statement, in full text and context, related only to the claim of the rights of free speech and thought under the First Amendment, or whether an auditor could detect an intention to claim the privilege against self-incrimination, protected by the Fifth."

The Court rejected the contention that, before a

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[1] The trial court in addressing himself to this issue, said (R. 138):

> On that, this Court finds as a matter of law that one may not. Since the privilege is personal, the defendant must assert it himself, since another may not know what is in a defendant's mind at the time he is called before the Congress to testify on pertinent matters, to proper inquiry, and therefore, one may not, by reference, assert that privilege.

witness may be held in contempt for failing to answer a question, he must be specifically directed to answer, citing its decision in *Emspak* v. *United States*, 203 F. 2d 54, handed down the same day. It observed, however, that a factual question as to whether petitioner had the intent to refuse to answer the question, or whether he thought the committee had abandoned the question, remained unresolved, and should be passed on by the trial judge on a new trial in accordance with its holding in *Bart* v. *United States*, 203 F. 2d 45, also handed down the same day.

The majority rejected, as it had in the companion *Emspak* case (203 F. 2d at p. 56), the contention that petitioner should have been afforded a hearing on his motion to dismiss the indictment for the reason that ten members of the grand jury were Government employees, and two, the wives of Government employees. Judges Bazelon and Edgerton thought that petitioner was entitled to a hearing on the grand jury issue.

Judge Miller, in a dissenting opinion joined by Judges Proctor and Clark (203 F. 2d at pp. 38-45), was of the view that the trial court did not rest its holding only on the premise that the privilege could not be claimed by reference, but also on a finding that Fitzpatrick's prior statement was itself insufficient to claim the privilege. He thus saw no reason to remand the case for a new trial.

ARGUMENT

1. Petitioner contends that the Court of Appeals erred in remanding the case for a new trial on the issues of (1) "* * * whether Quinn claimed the

privilege [against self-incrimination] by adopting the statement made by Fitzpatrick" (the witness who had testified the day before), and (2) on the issue as to whether he had the intent to refuse to answer or thought the question abandoned by the subcommittee. His present petition is premised on the assumption that the Court of Appeals was bound to direct an acquittal regardless of whether the trial court had resolved these issues on the trial of the case.

We submit that whether or not the Court of Appeals had the power to pass on these crucial issues affecting guilt or innocence in a criminal case as an initial proposition, it clearly had discretion not to do so, and to remand the case for retrial. Even in cases where the evidence is insufficient to make out a *prima facie* case, the Court of Appeals is not bound to direct an acquittal but may properly remand for a new trial. *Bryan* v. *United States*, 338 U.S. 552. Its discretion in cases where there exist unresolved issues of fact would clearly be no less extensive.

Since neither court below has passed on the issues of fact for which the case has been remanded, the present application to this Court for a judgment of acquittal is patently premature. This Court has repeatedly indicated that the proper forum for initial determinations of disputed issues of law and fact is the trial court. *Mason* v. *United States*, 244 U.S. 362, 366; *Vajtauer* v. *Commissioner*, 273 U.S. 103, 113. See also: *Bryan* v. *United States*, *supra* (338 U.S. at pp. 558-559);

Cone v. *West Virginia Paper Co.*, 330 U.S. 212, 215-216. Such is the case here. Whether petitioner properly apprised the subcommittee of a claim of privilege, in terms which would convey to them a meaning that he intended to do so, and whether he could have believed, in the particular circumstances of this case, that the subcommittee had abandoned the question and that he was no longer obligated to answer it, are issues which are not resolvable by mechanical reference to the record, and their proper determination is in the trial court in the first instance. On a new trial the statements of Fitzpatrick, which petitioner adopted by reference, can be examined, and it can be determined if they might have connoted to an auditor the fact that that witness was making a claim of privilege, or whether his general criticism of the methods and motives of the subcommittee was no more than that. It can also be determined, assuming that Fitzpatrick made a statement in his extended discourse which constitutes a specific claim of privilege, whether the subcommittee was properly apprised that petitioner was adopting that specific claim, or whether the subcommittee would have thought he was only adopting the general statements made by Fitzpatrick.[2] Finally the crucial issue of whether petitioner's refusal was deliberate, or based on an erroneous assumption

[2] For example, Fitzpatrick stated his objections to answering questions before being asked any, including a blanket statement that (R. 107) "This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment." Whether Quinn intended to adopt this or some other part of the critical remarks, is certainly not clear in the record.

of abandonment, can also be resolved in the light of all the pertinent facts.

2. Petitioner argues that his conviction is precluded under the principles of *res judicata* and estoppel, because the district court in another case found that Fitzpatrick, whose statement petitioner adopted by reference, had sufficiently apprised the subcommittee of his intent to rely on the privilege. *United States* v. *Fitzpatrick*, 96 F. Supp. 491. The simple answer to this is that *res judicata* and collateral estoppel apply only as between the same parties in a criminal action. *Frank* v. *Mangum*, 237 U.S. 309. See also: *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598. Moreover, as noted above, there remains unresolved the issue as to what part of Fitzpatrick's statement petitioner adopted.

3. The arguments based on the alleged infringement of the First Amendment and the alleged disqualification of government employees as grand jurors are discussed in the Government's brief in *Emspak* v. *United States*, No. 796, 1952 Term, to which the Court is respectfully referred.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1953.

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